United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-7043

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELLIS-BARKER SILVER CO., INC.,

Plaintiff-Appellant,

against

RIDGWAY POTTERIES LIMITED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Statement

It is significant that the defendant, having chosen not to answer the complaint but rather to attack on jurisdictional grounds, has devoted a significant portion of its brief to arguing the merits of the case. Defendant claims, for example, in its counter-statement of the case (brief of Defendant-Appellee page 2) that the sale in question took place outside of the United States and thus was not within the scope of the Agreement. On page 4 it is argued that the products in question were manufactured at defendant's Aderley Floral China Factory located at Southerland Road and are not within the scope of the Agreement. On page 6 defendant claims that title to the goods in ques-

tion passed when they left the seller's factory and thus defendant did not bring the goods into the United States. Again on page 7 the statement is made that

> "the Scotties were manufactured for, and sold to, Buchanan, a United Kingdom corporation wholly unaffiliated with defendant and were delivered in the United Kingdom to Buchanan, after which time defendant ceased to have any control or ownership over, or interest, in the Scotties."

It is respectfully suggested that, since defendant chose not to answer the complaint, the allegations of the complaint should be deemed admitted for purposes of the motion. To the extent that the merits of the action are relevant to this appeal, all questions of fact should be resolved in favor of plaintiff.

ARGUMENT

POINT I

Defendant has failed to bear the burden of showing that the New York Forum is inconvenient.

In attempting to establish that this case comes within the doctrine of *Forum Non Conveniens* defendant has relied upon statements of "fact" which are in many cases self-serving and controverted by plaintiff. In at least one instance defendant has clearly imposed upon the court in twisting the facts to suit its purpose. Defendant states for example:

> "that it neither owns, uses or possesses any real property in the State of New York. It has not qualified to do business and is not 'doing business' within the State of New York. It does not conduct any systematic or regular activities within the State." (Brief of Defendant-Appellee pages 5 and 6)

While this may be true in the narrow literal sense, the fact is that Allied English Potteries Limited, the parent corporation of Broadway Potteries Limited, formed a subsidiary corporation called Allied English Potteries Inc. which established a sales office at 11 East 26th Street, New York, New York, the very building in which Ellis-Barker did business (A-50). Defendant used this office as a base of operations and a great deal of the business between plaintiff and defendant was conducted there (A-34). In fact Mr. Frederick A. Hart, then President of plaintiff was advised of the pending transaction relating to the Scotties during the visit of one of defendant's employee's to New York (A-35).

The questions upon which the claim of *Forum Non Conveniens* rests, such as the activities of Defendant in New York State, the extent of its presence here, etc., are all matters into which this Court should inquire before depriving plaintiff of its remedy here.

POINT II

This Court should not decline jurisdiction because of an alleged forum stipulation clause which is ambiguous on its face and which should be construed strictly against the defendant as the draftsman.

The defendant urges that:

> "there is nothing in the record to support plaintiff's apparent (sic) contention that the Contract was drafted by defendant. Rather, plaintiff's own affidavit indicates that the November 23, 1967 Agreement was the product of extensive negotiation between defendant and plaintiff's assignor" (Brief of Defendant-Appellee pages 12 and 13).

Certainly the most cursory examination of the agreement indicates English rather than American draftsmanship. But in any event the question of who drafted the docu-

ment is one of fact which should not be tried on affidavit and should not be resolved against the plaintiff in an issue as vital as one of jurisdiction.

In attempting to construe the clause upon which Defendant-Appellee relies it must be admitted that the language is, to say the least, awkward and inartistic if it was intended to mean what Defendant claims it means. If a full forum stipulation clause was, in fact, intended a draftsman of even modest competence should have done a better job.

Defendant in urging its version of the meaning of the disputed clause places heavy emphasis on the word "sole" (Brief of Defendant-Appellee page 10). However, the most significant aspect of the clause, if a forum stipulation was intended, is the absence of reciprocity. The clause does not say that "the *Parties* will submit . . ." but rather that "the *Agent* will submit . . .". Apparently the possibility that the Agent would find occasion to bring an action against the Company was not contemplated. Indeed if one were to take the clause literally and agree with Defendant's interpretation of the relevant words, the Plaintiff would be without remedy in any Court, because the Company is not required, by the language of the clause, to submit to the jurisdiction of any Court. If the Agent is to have a remedy it must obtain jurisdiction by service of process and there is no limitation upon the Agent's right to bring an action in any Court.

Clearly, even without relying upon the doctrine that a document should be strictly construed against the draftsman, the only fair interpretation of the clause, is that it was intended to provide a remedy in England for the Company if the Company should choose to bring an action against the Agent. There is no way to distort the words "the Agent will submit . . ." to make it mean either that "both Parties will submit . . ." or that "the Agent will bring any action" and certainly one of those meanings would be necessary in order to sustain Defendant's position as to the meaning of the phrase.

POINT III

If the lower Court is sustained Plaintiff may well be deprived of its remedy in any Court.

Defendant notes on page 15 of its brief that:

> "it can not be said that Plaintiff would be denied a fair hearing by an English Court."

Plaintiff certainly does not contest this statement. At the same time it cannot be said that the Defendant would be denied a fair hearing by this Court.

It is clear therefore, that in the absence of a showing that the balance of convenience is strongly in favor of Defendant (and Defendant has certainly made no such showing) it can only be assumed that Defendant's strenuous endeavor to avoid a trial on the merits in the United States is based on the hope that Plaintiff, faced with the expense and inconvenience of pursuing its remedies in England, may be persuaded to abandon its claim. This would be *Forum Non Conveniens* in reverse. If the lower Court is upheld the Plaintiff may well be deprived of its day in Court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in appellant's principal brief the order of the District Court dismissing the complaint in this action should be reversed in all respects.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 2ND day of JUNE 1975

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Attorney for APPELLEE

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Gravely Lieberman